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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1185

FIRESTONE PLASTICS COMPANY, a Division of THE FIRESTONE TIRE & RUBBER COMPANY, UNION CARBIDE CORPORATION,

and

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, JOHN T. DUNLOP, SECRETARY, U. S. DEPARTMENT OF LABOR, and JOHN H. STENDER, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

and

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as amicus curiae in support of the petitioner.

I.

INTEREST OF AMICUS CURIAE

The National Association of Manufacturers ("NAM") is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. It is composed of approximately 13,000 manufacturing and related concerns of all sizes located throughout the United States and represents a substantial portion of this nation's industrial employment. Because of the broad scope and application of the Occupational Safety and Health Act of 1970 (84 Stat. 1593, 29 U.S.C. § 651, *et seq.*) (the "Act"), substantially all NAM member concerns are subject to the provisions of the Act and will be directly affected by the decision in this case.

In the interests of its membership, the NAM has appeared as *amicus curiae* in suits of significant national concern. For example, this Court recently granted the NAM's motion for leave to file a brief *amicus curiae* in *Gateway Coal Co.* v. *United Mine Workers of America,* 412 U.S. 903 (1973), a suit brought under the Labor-Management Relations Act and also involving the Federal Coal Mine Health and Safety Act of 1969. Virtually all of the member concerns of the NAM have a real and direct interest in the instant litigation and believe that, as before, the views of the NAM, its experience with the critical issues involved herein and its general manufacturing and technical expertise may be of assistance to the Court.

Issues of national importance which are of direct concern to the NAM and its members are presented because the Act applies to every employer engaged in a business affecting commerce. The Act empowers

the Secretary of Labor to regulate, through the adoption of safety and health standards, essential operations of virtually every business and industry in the United States. Moreover, because polyvinyl chloride "finds its way to companies which constitute over 10% of the national economy,"[1] many NAM members which manufacture or use polyvinyl chloride products are confronted with the imminent possibility that poylvinyl chloride will become unavailable or its manufacture will be drastically curtailed. The resultant effect on the national economy could be incalculable (J.A. 2359). Although the case raises many significant issues, this brief will consider only the proper interpretation of the feasibility requirement of Section (6)(b)(5) of the Act. The other issues are being treated in other briefs.

Although this case deals with a specific occupational safety and health standard, *viz.,* vinyl chloride, if the construction and interpretation of the Act by the court below is correct, the Secretary, in effect, can disregard the statutory mandate contained in Section 6(b)(5) of the Act (29 U.S.C. 655(b)(5)) which requires the Secretary to give due consideration to economic and technological feasibility factors in promulgating standards dealing with toxic substances and harmful physical agents and predicate such standards essentially on medical considerations. Thus, the ramifications of the decision below are not limited to the vinyl chloride industry but can have application to many other industries which are subject to the Act.

Accordingly, the NAM has proper interest in the resolution of the issues before the Court in this case.

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[1] OSHA's Final Environmental Impact Statement (J.A. 3350). (References to "J.A. ...." are to the Joint Appendix filed in the court below.)

II.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW ERRONEOUSLY INTERPRETED THE ACT'S FEASIBILITY REQUIREMENTS CREATING A CONFLICT WITH AT LEAST TWO UNITED STATES COURTS OF APPEALS ON AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The decision below, in effect, holds that the Secretary of Labor, when adopting a health and safety standard, may elect to ignore or reject all evidence relating to technological and economic feasibility and may predicate such a standard essentially on medical and health considerations. This conclusion is contrary to the express provisions of the Occupational Safety and Health Act of 1970 and the Congressional intent as manifested by the legislative history of the Act. Moreover, it is clearly contrary to decisions in other United States Courts of Appeals. It is, therefore, necessary for this Court to construe the Act, thereby clarifying the role of the Secretary in promulgating standards, resolving the conflict among circuits, and providing the essential criteria by which courts of appeals will review and rule upon the validity of occupational safety and health standards.

(a) The Feasibility Requirements of the Act and the Congressional Intent

Section 6(b)(5) of the Act (29 U.S.C. § 655(b)(5)) provides in part that:

> "The Secretary * * * shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health * * * ."

The legislative history underlying this provision demonstrates that the Secretary is required to promul-

gate feasible standards. As Senator Javits, author of the amendment from which the feasibility requirement was taken, explained:

> "As a result of this amendment, the Secretary, in setting standards, is expressly required to consider feasibility of proposed standards. This is an improvement over the Daniels bill, which might be interpreted to require absolute health and safety in all cases, regardless of feasibility, and the administration bill, which contains no criteria for standards at all." (S. Rep. No. 91-1282, 91st Cong., 2d Sess., at 58)

This expression of Congressional intent—that occupational safety and health standards be technologically and economically feasible—is also manifested by then Senator Saxbe's comment that safety and health standards should not be instituted at the sacrifice of industry's ability to remain productive and competitive (116 Cong. Rec. 36512, October 13, 1970).

Further indications that Congress did not intend standards promulgated by the Secretary to assure absolute health and safety independent of feasibility considerations are evidenced by the remarks of Senator Dominick when proposing the clarifying amendment to the act, which was ultimately enacted as part of Section 6(b)(5). Senator Dominick stated that the purpose of his amendment was to ensure that only those steps which are feasible and practical to provide a safe working atmosphere can be required of the employer (116 Cong. Rec. 37622, November 17, 1970).[2]

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[2] The District of Columbia Circuit in *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974), after reviewing the legislative history of the Act, confirmed that Congressional intent requires safety and health standards to be technologically and economically feasible (499 F.2d at pp. 477-78).

(b) The Secretary Failed To Comply With His Statutory Mandate in Promulgating the Vinyl Chloride Standard

Despite a clear expression of legislative intent, the Secretary when promulgating the vinyl chloride standard failed to follow the statutory mandate with respect to technological and economic feasibility.

The record evidence uniformly established, without contradiction, that with present or anticipated technology the attainment of very low concentration levels in the vinyl chloride and polyvinyl chloride industries is infeasible.[3] Indeed, OSHA's own engineering studies confirmed this conclusion,[4] determining that at a 1 ppm exposure level, 100 percent of the industry would be in danger of being forced to close (J.A. 3587). Even at the higher exposure levels of 10 to 15 ppm, the OSHA engineering study concluded that approximately 60 percent of the industry would be so endangered (J.A. 3587). Moreover, in the preamble to the standard, the Secretary not only acknowledged the uniform conclusions reached by these studies but "agree[d]" that neither presently nor "in the near

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[3] See, *e.g.*, J.A. 1048, 755, 746, 166, 1958, 1987, 2303, 2426-27, 2704, 565, 933, 1331-32, 1560-62, 368, 3584, 2982.

[4] See, for example, the OSHA-commissioned Snell Report (J.A. 3584, 3585):

> "Achieving 'No Detectable' Levels of VCM Principally Through Engineering Means Is Judged Not Feasible With Present Technology Both in the VCM and PVC Sectors.
>
> • • •
>
> "• • • Significant Engineering Uncertainty or Infeasibility Beyond 15-25 PPM Ceiling and 10-15 TWA for the PVC Industry."

See also Exhibit VI-1 of the Snell Report which noted that VCM exposure levels within the range of 10-15 ppm TWA are subject to high engineering risks or are not feasible (J.A. 3587).

future" would it be feasible technologically to achieve a 1 ppm exposure level (J.A. 3).

Similarly, the Secretary failed to follow the statutory mandate with respect to economic feasibility and ignored entirely the overwhelming evidence of the economic infeasibility of a 1 ppm standard. There is no suggestion anywhere in the final standard or its preamble that the Secretary even considered OSHA's or industry's economic studies. However, this uncontroverted evidence confirmed that the cost of compliance would be prohibitive and the economic impact on the national economy would be devastating.[5] Thus, for example, a study conducted by General Motors concluded that should polyvinyl chloride products become unavailable or drastically curtailed, the disruption to the national economy could be incalculable. It could affect the employment of as many as 450,000 employees at General Motors alone (J.A. 2359). The record further demonstrates that if the entire industry is shut down because of an infeasible standard, the resulting economic impact to the United States economy would equal approximately $65 to $90 billion of lost domestic production and a reduction in employment of about 1.7 to 2.2 million jobs (J.A. 2617, 2620). An additional result would be economic hardship of large magnitude

[5] The Final Environmental Impact Statement prepared by OSHA concluded that a standard requiring exposures to be reduced to 1 ppm would not be economically feasible: "The capital costs in polymer plants are likely to be substantial. Plants in this industry are so diverse that some may lose their competitive position, especially smaller firms with older equipment whose operations are already marginal. * * * Several employers may find it necessary to close operations, concentrating the industry into fewer companies and causing disruptions of several markets." (J.A. 3344-45)

creating severe economic dislocations in many local areas.[6]

In sum, the Secretary completely failed to take cognizance of the adverse impact of the new standard on the structure of the vinyl chloride industry, on prices in a time of rampant inflation, on the economy generally, and on foreign and domestic competition.

(c) The Decision Below Misinterprets the Feasibility Requirements of the Act

The court below sustained the vinyl chloride standard by interpreting and construing the Act so as to permit the Secretary to frame a standard which has the effect of forcing industry to develop and create "new technology" regardless of presently known and existing technological considerations or the economic consequences thereof. As the language of the Act and its underlying legislative history indicate, such a conclusion is contrary to this Act's mandate and, in effect, grants the Secretary unbridled discretion to adopt standards which are infeasible on the basis of present or reasonably foreseeable technology and which ignore all evidence with respect to their economic ramifications.

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[6] This result was confirmed by the American Footwear Industries Association (J.A. 1642-64): "If the footwear industry shut down the harshest consequences would be felt in small towns and rural areas. * * * An immediate effect * * * would be felt most acutely in areas such as Maine, Massachusetts, Missouri, New Hampshire, New York, Pennsylvania, Tennessee and Wisconsin. In those states there are heavy concentrations of factories producing footwear, and in many instances this production accounts for a large share of the income of the smaller cities" (J.A. 1647-48).

Unable to refer to any legislative history to buttress its interpretation, the court below merely cited two inapposite cases, neither of which involved the Act here in question.[7] These citations demonstrate that the court below has not only borrowed what may be referred to as the "technologically forcing purpose" concept from cases involving the Clean Air Act Amendments of 1970 (84 Stat. 1690, 42 U.S.C. § 1857f-1(b)(1), *et seq.* (Supp. 1974)) and the Automobile Safety Act of 1966 (80 Stat. 718, 15 U.S.C. § 1381, *et seq.* (Supp. 1974)), but, in so doing, it misapplied and misconstrued that concept.

A juxtaposition of the language and legislative history of the Occupational Safety and Health Act with the language and legislative history of these statutes demonstrates that Congress disavowed the idea that Section 6(b)(5) contains a "technologically forcing purpose". The early Senate bill, which rejected a feasibility requirement for the proposed Occupational Safety and Health Act was repudiated by the Senate. A bill containing what is now the Section 6(b)(5) feasibility requirement was substituted. By contrast, when Congress did intend a "technologically forcing purpose", it expressly so provided. As *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375, 391 (D.C.Cir. 1973), *cert. denied sub nom., Portland Cement Corporation* v. *EPA,* — U.S. —, 41 L.Ed.2d 226 (1974), and *Natural Resources Defense Council, Inc.* v. *EPA,* 489 F.2d 390, 411-12 (5th Cir. 1974),

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[7] *Chrysler Corporation* v. *Department of Transportation,* 472 F.2d 659 (6th Cir. 1972), and *Natural Resources Defense Council, Inc.* v. *EPA,* 489 F.2d 390 (5th Cir. 1974), cert. granted sub nom. *Train* v. *Natural Resources Defense Council, Inc.,* — U.S. — 42 L.Ed. 29, 46 (1974).

cert. granted sub nom., Train v. *Natural Resources Defense Council, Inc.*, — U.S. —, 42 L.Ed.2d 46 (1974), make abundantly clear, Congress in adopting the final language of the Clean Air Act Amendments of 1970 expressly rejected language virtually identical to the language on feasibility incorporated into Section 6(b)(5) of the Act.[8] Of even more importance, the Portland Cement case also establishes that when a "technologically forcing purpose" exists, the "forcing" must involve projections "based on existing technology * * * and cannot be based on 'crystal ball' inquiry" (486 F.2d at 391).[9]

Finally, the Court's reliance upon *Chrysler Corporation* v. *Department of Transportation*, 472 F.2d 659

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[8] Senator Muskie, the Senate sponsor of the Clean Air Act Amendments, made comments in support of the final language of that Act which are diametrically opposed to the comments of Senator Dominick and then Senator Saxbe on the final language of Section 6(b)(5) with respect to the issue of whether standards must be technologically feasible. See, *e.g.*, 116 Cong. Rec. 32901-02 (September 21, 1970).

[9] See also, *Essex Chemical Corporation* v. *Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973), *cert. denied sub nom. Appalachian Power Co.* v. *EPA*, — U.S. —, 40 L.Ed.2d 558 (1974) (wherein that court stated that "an achievable standard is one which is within the realm of the adequately demonstrated * * * and which [is] not at a level that is purely theoretical or experimental * * * .") See, further, *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 629 (D.C. Cir. 1973), which demonstrates that when Congress established a technologically forcing purpose in an environmental statute, it also provided for a statutory escape hatch to allow a suspension of the "technologically forcing" standards if industry could not achieve them. That no suspension provision appears in the Occupational Safety and Health Act of 1970 is convincing evidence that Congress never intended to force technology in standard setting under the Act.

(6th Cir. 1972), is equally erroneous. The statute at issue in the *Chrysler* case was the Automobile Safety Act of 1966 which is significantly different from the Act at issue in this case. Unlike the Occupational Safety and Health Act of 1970, the Automobile Safety Act, in providing for "technologically forcing" standards specifically granted its agency the power to specify a later effective date for meeting a "technologically forcing" standard. Such a power was expressly provided to ensure that "economic and engineering impossibility" would not cause a manufacturer to be put "out of business" (472 F.2d at 673-73).

(d) The Decision Below Conflicts With the Decisions of Other Courts of Appeals

That Section 6(b)(5) of the Act is now ripe for this Court's interpretation and construction is manifested by the conflict presently existing between at least two United States Courts of Appeals on this important question of federal law. The District of Columbia Circuit has held in *Industrial Union Department, AFL-CIO* v. *Hodgson,* 499 F.2d 467 (D.C.Cir. 1974), that Section 6(b)(5) prohibits promulgation of a standard which necessitates for compliance "protective devices unavailable under existing technology" [10] or which were promulgated "without regard for their economic impact" or which were "prohibitively expensive" (499

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[10] The District of Columbia Circuit's holding with respect to the necessity for promulgating a standard that could be met with "existing technology" was followed by the United States Court of Appeals for the Third Circuit in *Synthetic Organic Chemical Manufacturers Association* v. *Brennan,* — F.2d —, 2 OSHC 1402, 1406 (3d Cir. December 17, 1974).

F.2d at 477-78; emphasis supplied).[11] As demonstrated above, the Second Circuit in this Case concluded that the Secretary could promulgate valid standards "which require the development of new technology" [12] and ignored entirely questions of economic feasibility.

III.

CONCLUSION

For the foregoing reasons, and for the reasons set forth by the Petitioners, this Court is respectfully requested to grant the Petition for Writ of Certiorari.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
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March, 1975

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[11] "Congress does not appear to have intended to protect employees by putting their employers out of business—either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible" (499 F.2d at 478).

[12] Decision below, p. 18.